

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

GERRY BAUM,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Respondent.

Case No. DISM-01-0026

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 Hearing. This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and GERALD L. MORGEN, Vice Chair. The hearing was held at Lakeland Village in Medical Lake, Washington, on April 25, 2002.

1.2 Appearances. Appellant was present and was represented by Christopher Coker, Attorney at Law of Parr and Younglove, P.L.L.C. Patricia A. Thompson, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 Nature of Appeal. This is an appeal from a disciplinary sanction of dismissal for neglect of duty, gross misconduct and willful violation of employing agency or department of personnel rules or regulations. Respondent alleged that Appellant failed to provide a completed medical verification form.

1.4 Citations Discussed. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Rainwater v.

1 School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services,
2 PAB No. D93-053 (1994).

3 4 **II. FINDINGS OF FACT**

5 2.1 Appellant Gerry Baum was an Attendant Counselor 1 and a permanent employee for
6 Respondent Department of Social and Health Services (DSHS) at Lakeland Village. Appellant and
7 Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder,
8 Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on
9 March 23, 2001.

10
11 2.2 Appellant was employed by the state of Washington in 1986. He had an extensive history of
12 informal and formal disciplinary actions addressing leave issues. Appellant was required to provide
13 medical verification from a licensed medical provider for any absence for illness. Memorandums to
14 Appellant dated July 19, 1999, January 24, 2000, and July 24, 2000, confirmed this requirement.

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16 2.3 By letter dated February 27, 2001, Superintendent Al Kertes notified Appellant of his
17 dismissal, effective March 17, 2001, for neglect of duty, gross misconduct and willful violation of
18 published employing agency or department of personnel rules or regulations. Mr. Kertes alleged
19 that Appellant failed to be treated or examined by a licensed medical staff for an illness that caused
20 him to be absent from work from September 15, 2000 through September 29, 2000.

21
22 2.4 Appellant was previously absent from work from January 28 through March 11, 2000.
23 When he returned to work, he failed to submit a medical verification form for his absences on
24 January 29, and February 4 and 6, 2002. In addition, he had failed to obtain prior supervisory
25 approval for his absences on January 28, 30, 31, and February 1, 5, 7, 8, 11, 12, 13, 14, 15, 18, 19,
26 20, 22, and March 10, and 11, 2000. During the pre-disciplinary meeting regarding his absences,

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1 Appellant asked Superintendent Kertes, for one more opportunity to improve his attendance.
2 Appellant agreed that if he violated the "last chance agreement," he would voluntarily tender his
3 resignation. As a result, on May 25, 2000, Appellant was given a reduction in salary and an
4 opportunity to improve his deficiencies.

5
6 2.5 Appellant was absent from work from September 15 through September 29, 2000. When
7 Appellant returned to work on September 30, 2000, he submitted a medical verification form from
8 his medical provider that indicated Appellant said that he had a respiratory infections but that he
9 had not been treated for the condition.

10
11 2.6 Appellant's supervisor, Donna Morley, received a copy of the medical verification form on
12 October 3, 2000. Because the form indicated that Appellant had not been treated for his respiratory
13 infection, she disapproved Appellant's leave request.

14
15 2.7 On October 26, 2000, Ms. Morley initiated a Conduct Investigation Report (CIR) alleging
16 that Appellant filed to comply with the medical verification requirement.

17
18 2.8 On November 11, 2000, Ms. Morley received a revised medication verification form. This
19 form was signed by Appellant's medical provider on November 8, 2000, and indicated that
20 Appellant was examined and treated for a cyst on September 29, 2000.

21
22 2.9 Debe LaForce, Attendant Counselor Manager, was assigned to conduct the CIR
23 investigation. Ms. LaForce gathered documentation, including the medical verification forms. She
24 requested further information from Appellant's medical provider. On November 9, 2000,
25 Appellant's medical provider provided a third medical verification form and clarified that Appellant
26 was examined and treated for a cyst on September 29, 2000, and that he mentioned having a

1 respiratory infection. The medical provider did not indicate that Appellant was treated for the
2 respiratory infection.

3
4 2.10 After speaking with Ms. Morley, Appellant and Appellant's medical provider's office staff,
5 Ms. LaForce concluded that Appellant's medical provider did not examine or treat Appellant for a
6 respiratory infection.

7
8 2.11 At the time of this incident, Al Kertes was Appellant's appointing authority. After the CIR
9 investigation, Mr. Kertes met twice with Appellant. Mr. Kertes concluded that Appellant was
10 absent from work due to a respiratory infection but that he went to his medical provider for a cyst.
11 Mr. Kertes determined that Appellant was aware of what was needed for him to be in compliance
12 with the medical verification requirement but that he violated the requirement when he failed to
13 provide proper documentation for his absence. Mr. Kertes had considered terminating Appellant in
14 May 2000, but because Appellant had entered into to a last chance agreement, Mr. Kertes gave him
15 a salary reduction instead. Now, Mr. Kertes concluded that in addition to failing to provide a
16 medical verification form for his absence, Appellant violated the last chance agreement. Therefore,
17 Mr. Kertes determined that Appellant's termination was more than warranted.

18
19 2.12 Lakeland Village Procedure 5.12 addresses sick leave and medical verification. The
20 procedure states, in relevant part:

21 MEDICAL VERIFICATION:

22 A. An employee may be placed on medical verification when the supervisor
23 determines it necessary because of suspected sick leave abuse. Before placing an
24 employee on medical verification, the supervisor is to conduct verbal and written
counseling.

25 B. While on medical verification, the employee's time will be reviewed at least
26 quarterly by the appropriate supervisor. At the time of each review, the

1 supervisor will discuss with the employee what improvements are necessary in
2 order to be removed from medical verification. Generally, it will take at least six
3 months for the employee to gain and maintain sufficient time to be removed.
However, each instance will be handled on a case by case basis. If there is not
improvement following the first quarter review, further action may result.

- 4 C. While an employee is on medical verification, upon return to work from each use
5 of sick leave, the employee must present a medical release from the employee's
6 licensed medical provider to the appropriate supervisor BEFORE going to the
7 worksite. The Leave Requests are to be filled out at that time and the medical
8 release attached to the Leave Request. The medical release must state that the
9 employee was examined/treated by a licensed medical staff and is released to
10 return to work without any restrictions. Any absence for illness for which
11 medical verification is required, but not received, will be charged as leave
without pay and will be considered an unauthorized absence. If this procedure is
not followed, corrective/disciplinary action may result.

11 **III. ARGUMENTS OF THE PARTIES**

12 3.1 Respondent argues that Appellant was absent from work from September 15 to September
13 29 because of a cold, not for the reason noted by his physician on the medical verification form.
14 Respondent contends that the issue is not whether Appellant was examined by his physician on
15 September 29, but whether Appellant was examined and treated for the illness that cause him to be
16 absent from work from September 15 to September 29. Respondent argues that Appellant was not
17 examined or treated for his cold. Therefore, Respondent asserts that Appellant violated the
18 medication verification requirement and that based on his prior history, dismissal was appropriate.

19
20 3.2 Appellant argues that he complied with the requirements of the procedure and asserts that
21 the reason for his absence should not be considered. Appellant contends that his physician saw him
22 on September 29 for a cold and for a cyst. Appellant further contends that he is not required to
23 ensure that the physician fills out the medical verification form correctly. Appellant asserts that in
24 this case, his physician incorrectly completed the form. Appellant argues that he complied with the
25 medical verification requirement, that he followed the medical verification procedure, and that his
26 appeal should be granted.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987).

4.4 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

4.5 Willful violation of published employing agency or institution or Personnel Resources Board rules or regulations is established by facts showing the existence and publication of the rules or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

4.6 Respondent has met its burden of proof that Appellant neglected his duty to comply with the medical verification requirement. Respondent has also met its burden of proof that Appellant's

1 failure to provide a medical verification form for his absence due to his cold, constituted a violation
2 of institution policy. Furthermore, Respondent has met its burden of proof that Appellant's absence
3 adversely affected the institution's ability to provide the level of staffing necessary to care for
4 residents, and therefore, his actions rose to the level of gross misconduct.

5
6 4.7 Under the totality of the proven facts and circumstances, including Appellant's extensive
7 history of informal and formal discipline for attendance related issues and the May 25, 2000, last
8 chance agreement, the disciplinary sanction of dismissal is appropriate. Therefore, the appeal
9 should be denied.

10
11 **V. ORDER**

12 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Gerry Baum is denied.

13 DATED this _____ day of _____, 2002.

14 WASHINGTON STATE PERSONNEL APPEALS BOARD

15
16 _____
17 Walter T. Hubbard, Chair

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19 _____
20 Gerald L. Morgen, Vice Chair

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